

<sup>1</sup> Motion for Assessment of Penalties and Attorney Fees (filed Dec. 31, 2003).

### ISSUES

This appeal arises from claimant's post award application for additional medical treatment and for attorney fees and penalties to be assessed against respondent and its insurance carrier for failure to pay medical compensation when due. In his June 15, 2004 Post Award Decision, Judge Foerschler ordered respondent "to provide the necessary medication and pay any balances now due for them and ensure their supply as needed for [c]laimant."<sup>2</sup> The order is silent as to penalties and attorney fees.

Neither TIG nor Travelers/CSSC address the issues of penalties and attorney fees in their respective briefs to the Board. Instead, TIG requests the Board to remand this matter to the ALJ for further proceedings. In addition, TIG argues that the ALJ's October 30, 1995 Award "should be amended to fix the accident date after January 1, 1994, or within the coverage period following the expiration of the TIG Insurance Company policy."<sup>3</sup>

Travelers/CSSC contends that the Board is without jurisdiction to address the issues raised in this appeal because Judge Foerschler's Post Award Decision is a preliminary hearing order under K.S.A. 44-534a(2). "No dispute as [to] the compensability of the injury under the Workers' Compensation Act was raised at the hearing on May 13, 2004. As such, the Appeals Board does not have jurisdiction to hear claimant's appeal."<sup>4</sup> Travelers/CSSC also requests that the Board remand this case to Judge Foerschler for a determination of which insurance carrier would be responsible for the claimant's medical compensation.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs the Board finds and concludes that the award of medical benefits should be affirmed but this matter should be remanded to the ALJ for a determination of the remaining issues presented at the May 13, 2004 hearing which were not decided in the ALJ's June 15, 2004 Post Award Decision.

Contrary to the assertion by counsel for Travelers/CSSC, the ALJ's Post Award Decision is not a preliminary hearing order under K.S.A.44-534a. Rather, it is an order on a post award application for medical benefits which is governed by K.S.A. 44-510k. That

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<sup>2</sup> Post Award Decision at 1 and 2 (May 13, 2004).

<sup>3</sup> Brief of Respondent and TIG Insurance Company at 2 (filed July 22, 2004).

<sup>4</sup> Reply Brief of Travelers Property Casualty and Constitution State Service Company to Claimant's Brief in Regard to Application for Review of an Order Dated June 15, 2004 at 2 (filed July 23, 2004).

statute provides: "A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A.44-551 and amendments thereto."<sup>5</sup>

Subsection (c) of that same statute provides: "The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto." An ALJ's order concerning either attorney's fees or penalties is also a final order for purposes of the Board's jurisdiction under K.S.A.44-551.

"All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within ten (10) days. . . Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings."<sup>6</sup>

The Act, however, contemplates that review by the Board be of findings and conclusions made by the ALJ. K.S.A. 44-555c(a) provides that "[t]he review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The issues raised by the parties for determination by the Board, specifically, penalties, attorney fees and which insurance carrier is liable for claimant's medical benefits, were not decided by the ALJ. Accordingly, this matter should be remanded to the ALJ for a determination of those issues and for such further proceedings as may be required.

### **Award**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post Award Decision of Administrative Law Judge Robert H. Foerschler is affirmed as to the order for medical benefits but is hereby remanded for a determination of the remaining issues.

**IT IS SO ORDERED.**

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<sup>5</sup> K.S.A.44-510k(a).

<sup>6</sup> K.S.A.44-551(b)(1).

Dated this \_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant  
Thomas R. Hill, Attorney for Respondent and TIG Premier Insurance Company  
Theresa A. Otto, Attorney for Travelers Property Casualty Company and  
Constitution State Service Company  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director